IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 15, 2005 Session

ROGER THOMPSON, ET AL. v. RUBY TUESDAY, INC., a Tennessee Corporation for Profit, ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 03C-168 Barbara Haynes, Judge

No. M2004-01869-COA-R3-CV - Filed February 27, 2006

Roger Thompson sustained injuries after tripping and falling over a speed bump in a parking lot of a shopping complex after exiting a Ruby Tuesday Restaurant. Mr. Thompson and his wife ("the Plaintiffs") subsequently filed suit against Ruby Tuesday, Inc. as lessee of the restaurant premises, Owen L.P. as owner of the shopping complex, and Hold-Thyssen, Inc. as the lessee and manager of the shopping complex premises, including the parking lot area where Mr. Thompson fell. All of the defendants moved for summary judgment, which the trial court subsequently granted. The Plaintiffs appeal arguing that disputed issues of material fact exist from which a jury could render judgment in their favor against all defendants. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part; Reversed in Part; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

John W. Nolan, III and John Michael Garrett, Nashville, Tennessee, for the Appellants, Roger Thompson and Wife, Patsy Thompson.

Paul M. Buchanan and Julie Bhattacharya Peak, Nashville, Tennessee, for the Appellees, Ruby Tuesday, Inc. And Ruby Tuesday, LLC.

William B. Jakes, III, Nashville, Tennessee, for the Appellees, Owen, L.P. and Hold-Thyssen, Inc.

OPINION

Factual Background and Procedural History

This premises liability action arises from a slip and fall accident in the parking lot of a Ruby Tuesday's restaurant in Nashville, Tennessee. On the evening of February 9, 2001, while exiting the restaurant, Plaintiff Roger Thompson (hereinafter referred to as "Mr. Thompson" or

cumulatively with his wife, Patsy Thompson, as "the Plaintiffs") ate dinner at a Ruby Tuesday restaurant located at 521 Donelson Pike in Nashville, Tennessee. In his complaint, Mr. Thompson alleged that upon exiting the restaurant, the lighting in the parking lot was insufficient and, as he walked across the lot to his vehicle, he "stumbled on the broken edge of a speed bump and fell injuring his left shoulder." Mr. Thompson subsequently testified in his deposition that the edge of the speed bump over which he tripped was between twelve to twenty-five feet from the steps leading to the entrance to the Ruby Tuesday Restaurant.

At the time of Mr. Thompson's accident, the restaurant was operated by Defendants Ruby Tuesday, Inc. and Ruby Tuesday, LLC (hereinafter collectively referred to as "Defendant Ruby Tuesday").[1] Defendant Owen, L.P. ("Defendant Owen") owned the premises and Defendant Hold-Thyssen, Inc. ("Defendant Hold-Thyssen") leased and managed the property, including the parking lot. Defendant Ruby Tuesday in turn leased the premises from Defendant Owen. According to the undisputed terms of the lease:

> 13. Maintenance of Common Areas: Landlord shall construct, repair, maintain, and operate the parking and other common areas and common facilities in the Shopping Center. Common Facilities and Common Areas . . . shall mean all areas, equipment, signs and special services provided by Landlord for the common or joint use and benefit of the occupants of the whole Shopping Center, their employees, agents, servants, customers and other invitees, including, without limitation, parking areas, access roads, driveways, retaining walls, landscaped areas, truck service ways or tunnels, loading docks, pedestrian malls (enclosed or open), courts, stairs, ramps, and sidewalks, comfort and first aid stations, and parcel pick-up stations. . . . Landlord agrees to keep the parking area adjacent to the Demised Premises lighted each day of the Lease Term or any renewal thereof, during the business hours of Tenant after dark. . . .
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> . . . .
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> (20) Repairs: (a) By Landlord: Landlord shall . . . during the term of this Lease, maintain, and keep in good order, condition and repair, the Demised Premises and the Shopping Center and every part thereof, including, but not limited to, . . . parking areas, driveways, streets, landscaping, parking lot lights . . . . Should Landlord fail to make such repairs, or to perform such maintenance, after notice from the Tenant,

[1] From the record, it appears that Ruby Tuesday, Inc. and Ruby Tuesday, LLC constitute the same legal entity which has engaged in a single defense effort in this suit. Defendant Ruby Tuesday is the successor corporation for Morrison Restaurants, Inc. According to the record, Ruby Tuesday and Morrison Restaurants, Inc., split from the previous parent corporation Morrison's Fresh Cooking, Inc. In 1998, Piccadilly subsumed Morrison Restaurants, Inc. Thus, at the time of this action, Morrison, Inc., had no relationship with the owner or operator of the restaurant currently the subject of this action. As a result, the Plaintiffs' took a voluntary non-suit on all claims against Piccadilly Cafeterias, Inc., and Morrison Restaurant's, Inc.

> Tenant shall have the right to make such repairs, or to perform such maintenance, and Tenant shall be reimbursed therefore by Landlord. . . .

On January 21, 2003, Mr. Thompson and his wife, Patsy Thompson (hereinafter referred to as "Mrs. Thompson" or, in conjunction with her husband, Roger Thompson, as "the Plaintiffs") filed suit against Defendant Ruby Tuesday and Defendants Owen and Hold-Thyssen alleging that Ruby Tuesday, as operator of the restaurant, and Defendants Owen and Hold-Thyssen, as owner and lessor/manager of the premises, breached various duties of care. After conducting discovery, Defendant Ruby Tuesday filed a Motion for Summary Judgment on August 28, 2003. Likewise, Defendants Owen and Hold-Thyssen also filed a Motion for Summary Judgment on April 28, 2004. After oral argument, the trial court granted summary judgment in favor of both Defendant Ruby Tuesday and Defendants Owen and Hold-Thyssen. The Plaintiffs appeal.

Issue Presented

We perceive the issue in this case to be whether the trial court erred in granting the Defendants' motions for summary judgment. For the reasons stated herein, we affirm in part and reverse in part.

Standard of Review

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). Specifically, the moving party must affirmatively negate an essential element of the nonmoving party's claim or conclusively establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). When a party makes a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.*

A mere assertion that the nonmoving party has no evidence does not suffice to entitle the moving party to summary judgment. *Id.* Rather, in determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588. We review an award of summary judgment de novo, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Analysis

This Court recently addressed the legal principles behind premises liability in *Barron v. Stephenson*, No. W2004-02906-COA-R3-CV, 2006 WL 16310 (Tenn. Ct. App. Jan. 4, 2006), and held as follows:

> The owner or operator of a place of business is not an insurer of the safety of those frequenting the property. *See Smith v. Inman Realty Co.*, 846 S.W.2d 819, 822 (Tenn. 1992); *Jones v. Zayre, Inc.*, 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980). However, they are required to exercise ordinary care with regard to social guests and business invitees on the premises. *See Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn. 1998); *Smith*, 846 S.W.2d at 822; *Jones*, 600 S.W.2d at 732. "It is a well-settled rule of this State that the mere fact that an injury has been sustained never raises a presumption of negligence." *Mullins v. Seaboard Coastline Ry. Co.*, 517 S.W.2d 198, 201 (Tenn. Ct. App. 1974) (citations omitted); *see also Fulton v. Pfizer Hosp. Prods. Group, Inc.*, 872 S.W.2d 908, 911 (Tenn. Ct. App. 1993). As our supreme court has previously noted,
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> > [n]o claim for negligence can succeed in the absence of any one of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.
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> *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993) (citations omitted).
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> In premises liability cases, the superior knowledge of the condition of the premises possessed by the owner or operator triggers liability. *See Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994); *Ogle v. Winn-Dixie Greenville, Inc.*, 919 S.W.2d 45, 46 (Tenn. Ct. App. 1995). Thus, before the owner or operator of the premises may be held liable for negligently allowing a dangerous or defective condition to exist on the premises, the plaintiff must also prove the following:
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> > 1) the condition was caused or created by the owner, operator, or his agent, or 2) if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior the accident.
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> [*Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004) (citations omitted)]; *see also Jones*, 600 S.W.2d at 732.

Barron v. Stephenson, No. W2004-02906-COA-R3-CV, 2006 WL 16310, at *3 (Tenn. Ct. App. 2006).

Defendant Ruby Tuesday

In the case at bar, the Plaintiffs first assert that the trial court erred in granting summary judgment for Defendant Ruby Tuesday because disputed issues of material fact exist which could serve as a basis for a jury to conclude that Defendant Ruby Tuesday is liable for negligence in failing to maintain the parking area in a safe condition. We disagree. As previously noted by the Tennessee Supreme Court, a party may prevail under summary judgment by "affirmatively negat[ing] an essential element of the nonmoving party's claim, i.e., a defendant in a negligence action would be entitled to summary judgment if he convinced the court that he owed no duty to the plaintiff." *Byrd*, 847 S.W.2d at 216 n. 5. The question of whether a defendant owed a duty to a plaintiff is a question of law. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993) (citations omitted).

"Tennessee common law has long held [that a] *landlord* [is] responsible for the condition of common areas under his control." *Tedder v. Raskin*, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987) (emphasis added). Specifically, "where [a] landlord retains possession of a part of the premises for use in common by different tenants, the landlord is under a continuing duty imposed by law to exercise reasonable care to keep the common areas in good repair and safe condition." *Id.* at 347-48 (citing *Woods v. Forest Hill Cemetery*, 192 S.W.2d 987 (Tenn. 1946); *Buggs v. Memphis Hous. Auth.*, 450 S.W.2d 596 (Tenn. Ct. App. 1969)). However, although the responsibility for maintaining "common areas" falls upon landlords, lessees do have the "duty to see that the leased premises and its approach is in a reasonably safe condition." *Gladman v. Revco Disc. Drug Ctrs., Inc.*, 669 S.W.2d 677, 678-79 (Tenn. Ct. App. 1984).

This Court recognized a lessee's duty to maintain the approach to their premises in *Roberts v. Tenn. Wesleyan Coll.*, 450 S.W.2d 21 (Tenn. Ct. App. 1969). In *Roberts*, the plaintiff fell on the front steps of a college building while attending a dance recital hosted by Helen Wilson, a dance instructor who had leased the auditorium space of the building from Tennessee Wesleyan College for the purpose of presenting a year-end dance recital. *Id.* at 23. However, the college maintained control of the entrance to the lobby of the building, which administrative personnel used to access their offices. *Id.* After sustaining injuries as a result of her fall, the plaintiff filed suit against both the college and Miss Wilson. *Id.* At trial, the trial court directed a verdict for both the college and Miss Wilson after finding the plaintiff to be a "licensee[2] to whom

[2]At the time of the *Roberts* opinion, Tennessee courts distinguished between licensees and invitees, whereby "the owner or occupant of land owe[d] a duty of ordinary care to an 'invitee,' but, to a 'licensee' or 'trespasser' owe[d] only the duty not to injure him willfully or by gross negligence nor lead him into a trap." *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984) (citations omitted) *partially abrogated by McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). However, Tennessee abrogated the licensee/invitee distinction in *Hudson v. Gaitan*, where the Tennessee Supreme Court held that

> [t]he common law classifications of one injured on land of another as an "invitee" or "licensee" are no longer determinative in this jurisdiction in assessing the duty of care owed by the landowner to the person injured; the duty owed is one of reasonable care under all of the attendant circumstances,

(continued...)

the defendants owed no duty other than to refrain from willfully or wantonly injuring her or setting a trap for her." *Id.* at 22-23. On appeal, this Court reversed the trial court and held that a jury could find that the plaintiff constituted an invitee and that both the college and Miss Wilson breached a duty of care toward the plaintiff. *Id.* at 25-26. Specifically, in addressing Miss Wilson's duty of care, this Court found that Miss Wilson, as a lessee, had a duty to invitees[3] to see that the leased premises "*and its approach* was in a reasonably safe condition." *Id.* at 26 (emphasis added).

This Court further interpreted the *Roberts* holding in *Gladman v. Revco Discount Drug Center, Inc.*, a case with facts strikingly analogous to those presented is this suit. In *Gladman*, the plaintiff sustained injuries after falling in a shopping center parking lot while on his way to the defendant's store. *Gladman*, 669 S.W.2d at 678. The defendant was a lessee of the premises and under the terms of the lease, "the lessor was to retain control over the common areas of the shopping center and perform all necessary maintenance for these areas." *Id*. As a result of his fall, the plaintiff filed suit against the defendant, but not the lessor of the premises. *Id.* The trial court subsequently granted summary judgment in favor of the defendant, and the plaintiff appealed arguing that the defendant, as a lessee, was "concurrently liable with the lessor for the [p]laintiff's injuries." *Id.* On appeal, this Court found the facts distinguishable from those in *Roberts* and concluded as follows:

> The *Roberts* case simply required a lessee to provide reasonable ingress and egress. In the case at bar the [p]laintiff was crossing over the parking lot of a shopping center in which many stores were located. When he fell[,] the [p]laintiff was still a good distance from the approach to the [d]efendant's store. (footnote omitted). This case is not an ingress or egress situation as was *Roberts*.
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> . . . We do not believe that it would be reasonable to require a single lessee to clean the entire parking lot of a multiple-store shopping center in order to meet this ingress and egress requirement. In *Torres v. Piggly Wiggly Shop Rite Foods, Inc*., 93 N.M. 408, 600 P.2d 1198 (Ct. App. 1979), the [c]ourt was faced with this issue and said that where there is a parking lot in a shopping center reserved for the use of all tenants, a particular lessee would not be liable for injuries on the lot unless the lessee had exercised control over the parking lot. . . . Here the Defendant was not shown to

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[2](...continued)
foreseeability of the presence of the visitor and the likelihood of harm to him being of the principal factors in assessing liability.

Hudson, 675 S.W.2d at 703.

[3]The determination by this Court in *Roberts* that Miss Wilson owed a duty to ensure the leased premises and its approach was in reasonably safe condition was contingent upon the plaintiff being classified as an "invitee." *Roberts*, 450 S.W.2d at 26. However, as previously noted, Tennessee has abrogated the licensee / invitee distinction and instead requires that landowners exercise a duty of reasonable care toward *all visitors*. *See Hudson*, 675 S.W.2d at 703.

> have exercised control over the parking lot, rather by the lease agreement the lot remained in the control of the lessor.
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> In view of the above authorities, we agree that the summary judgment was proper.

Gladman, 669 S.W.2d at 679.

In the case at bar, the undisputed facts show that Defendant Ruby Tuesday leased the premises from Defendant Owen. Pursuant to the terms of the lease, as noted previously, Defendant Owen, as lessor, agreed to the following terms:

> Landlord shall construct, repair, maintain, and operate the parking and other common areas and common facilities in the Shopping Center. Common Facilities and Common Areas . . . shall mean . . . parking areas, access roads, driveways, retaining walls, landscaped areas, truck service ways or tunnels, loading docks, pedestrian malls (enclosed or open), courts, stairs, ramps, and sidewalks, comfort and first aid stations, and parcel pick-up stations. . . . Landlord agrees to keep the parking area adjacent to the Demised Premises lighted each day of the Lease Term or any renewal thereof, during the business hours of Tenant after dark.
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> Landlord shall . . . maintain, and keep in good order, condition and repair, the Demised Premises and the Shopping Center and every part thereof, including, but not limited to, . . . parking areas, driveways, streets, landscaping, parking lot lights . . . . Should Landlord fail to make such repairs, or to perform such maintenance, after notice from the Tenant, Tenant shall have *the right* to make such repairs, or to perform such maintenance, and Tenant shall be reimbursed therefore by Landlord.

(emphasis added).

Although Defendant Owen expressly undertook the duty to maintain the parking lots and lighting in common areas under the lease, Plaintiff nonetheless asserts that the Defendant Ruby Tuesday has a concurrent duty to maintain the parking lot due to the clause in the lease stating: "Should Landlord fail to make such repairs, or to perform such maintenance, after notice from the Tenant, Tenant shall have the right to make such repairs, or to perform such maintenance, and Tenant shall be reimbursed therefore by Landlord." We disagree. When interpreting a contract, the guiding principle is to "ascertain the intention of the parties and to give effect to that intention consistent with legal principles." *Rainey v. Stansell*, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992) (citing *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975)). In determining the intent of the contracting parties, the court should look to the four corners of the document and, where there is no ambiguity, the terms of the contract should

be given their ordinary meaning. *Winfree v. Educators Creditor*, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995). The courts should also look to the subject matter of the agreement, the circumstances of the transaction giving rise to the particular issue before the court, and the prior conduct of the parties in carrying out the contract's terms. *Penske Truck Leasing Co., L.P. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990).

When viewing the lease provision cited by Plaintiff in conjunction with the lease agreement as a whole, we find that the said provision does not place a duty upon Defendant Ruby Tuesday to maintain the parking area of the shopping center. Rather, the provision grants Defendant Ruby Tuesday the right, not the duty, to engage in such maintenance should the landlord, Defendant Owen, fail to do so, and only after first giving Defendant Owen notice. To interpret this provision otherwise would place Defendant Ruby Tuesday, as well as all other lessees in the shopping center bound to the same lease provision, in the position of having to monitor the condition of all common areas in the shopping complex in order to meet their duty of care. We find such a result contrary to the intent of the parties expressed in the lease, and thus hereby find that the lease provisions place no duty upon Defendant Ruby Tuesday to maintain either the parking lots or the common-area lighting in the shopping complex in question. Rather, we find that this duty was expressly assumed by Defendant Owen, as lessor of the premises, which subsequently delegated such duty to Defendant Hold-Thyssen as lessor and manager of the premises.[4]

Having held that Defendant Ruby Tuesday has no duty to maintain the common areas of the shopping center pursuant to the terms of the lease, we next address whether Defendant Ruby Tuesday breached any duty of care in maintaining "the approach" to their premises as set forth in *Roberts*. As previously noted, this Court held in *Roberts* that a lessee has the duty to maintain "the approach" to their premises in a reasonably safe condition. In *Roberts*, we found that "the approach" to the premises included the front steps leading to the entrance to the building. *Roberts v. Tenn. Wesleyan Coll.*, 450 S.W.2d 21, 22, 26 (Tenn. Ct. App. 1969). However, this Court in *Gladman* refused to hold a lessee liable when the plaintiff fell in a shopping center parking lot maintained by the landlord. Rather, this court held as follows:

> The *Roberts* case simply required a lessee to provide reasonable ingress and egress. In the case at bar the [p]laintiff was crossing over the parking lot of a shopping center in which many stores were located. When he fell[,] the [p]laintiff was still a good distance from the approach to the [d]efendant's store. (footnote omitted). This case is not an ingress or egress situation as was *Roberts*.

Gladman v. Revco Disc. Drug Ctrs., Inc., 669 S.W.2d 677, 678-79 (Tenn. Ct. App. 1984).

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[4]Defendants Owen and Hold-Thyssen stipulate that Defendant Owen owns the premises involved in this case, and that Defendant Hold-Thyssen is the lessee and manager of said property. Defendants Owen and Hold-Thyssen have also appeared to stipulate for the purposes of summary judgment that both entities had a duty to maintain the premises, including the parking lot, involved in this suit. As a result, we will address the liability of Defendants Owen and Hold-Thyssen together.

We find the undisputed facts in the case at bar analogous to those presented in *Gladman*. In their initial complaint, the Plaintiffs' asserted "that due to the bad lighting and the broken unmarked speed bump[,] . . . Mr. Thompson tripped causing the injuries described herein." Subsequently, Mr. Thompson testified in his deposition that the alleged broken speed bump was located between *twelve and twenty-five feet* away from the steps leading to the entrance of the restaurant operated by Defendant Ruby Tuesday. As a result of this evidence, we find that, as in *Gladman*, the Plaintiffs here have failed to provide evidence showing that this case is "an ingress or egress situation as was *Roberts*." *Gladman*, 669 S.W.2d at 679. We therefore affirm the award of summary judgment in favor of Defendant Ruby Tuesday.

Defendants Owen and Hold-Thyssen

Having determined that Defendants Owen and Hold-Thyssen, and not Defendant Ruby Tuesday, had a duty to maintain the parking lot in this case, we now address the propriety of the trial court's grant of summary judgment in favor of Defendants Owen and Hold Thyssen. The Plaintiffs assert that the trial court erred in granting summary judgment for Defendants Owen and Hold-Thyssen because disputed issues of material fact exist which could serve as a basis for a jury to conclude that Defendants Owen and Hold-Thyssen were negligent in failing to maintain the parking area in a safe condition. Specifically, as we interpret the Plaintiffs' brief, the Plaintiffs make two assertions of liability against Defendants Owen and Hold-Thyssen. First, the Plaintiffs assert disputed issues of material fact exist as to whether Defendants Owen and Hold-Thyssen were negligent in failing to remedy the alleged broken condition of the injury-causing speed bump. Second, the Plaintiffs aver that, despite the alleged condition of the speed bump, disputed issues of material fact exist as to whether Defendants Owen and Hold-Thyssen were negligent in failing to properly light the parking area, thus creating lighting conditions which failed "to contrast the speed bump from the [pavement], and therefore, warn a customer of the change in the walking services." For the reasons set forth below, we affirm in part and reverse in part.

As noted previously, this Court recently discussed the legal principles behind premises liability in *Barron v. Stephenson*, No. W2004-02906-COA-R3-CV, 2006 WL 16310 (Tenn. Ct. App. Jan. 4, 2006). In that case, we held that plaintiffs asserting premises liability actions must prove the basic elements of negligence —i.e., duty, breach, injury, causation in fact, and legal or proximate causation. *Id.* at *3. However, we further noted that

> [i]n premises liability cases, the superior knowledge of the condition of the premises possessed by the owner or operator triggers liability. *See Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994); *Ogle v. Winn-Dixie Greenville, Inc.*, 919 S.W.2d 45, 46 (Tenn. Ct. App. 1995). Thus, before the owner or operator of the premises may be held liable for negligently allowing a dangerous or defective condition to exist on the premises, the plaintiff must also prove the following:

> 1) the condition was caused or created by the owner, operator, or his agent, or 2) if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior the accident.

Blair, 130 S.W.3d at 764 (citations omitted); *see also Jones*, 600 S.W.2d at 732.

Id.

In regard to the Plaintiffs' first argument, we find no disputed issues of material fact which could allow for a jury to conclude that Defendants Owen and Hold-Thyssen are liable for injuries resulting from the alleged broken state of the speed bump in this case. Rather, we find that the undisputed facts, viewed in a light most favorable to the Plaintiffs, fail to show that Defendants Owen and Hold-Thyssen had actual or constructive notice of the alleged defect in the speed bump, and thus are not liable to the Plaintiffs for Mr. Thompson's fall as a result of such alleged defect. The Plaintiffs submitted no proof showing that Defendants Owen and Hold-Thyssen had actual knowledge of the speed bump's alleged defective condition. Furthermore, the only proof set forth by the Plaintiffs in support of their argument that Defendants Owen and Hold-Thyssen had constructive notice of the alleged defect was a photograph which, according to the Plaintiffs, could allow a jury to "infer that the [speed bump became dislodged and that] movement of the speed bump occurred over a period of time, and it was likely to have been caused by the large mechanical sweeping machine that was driven and used daily to go over the entire parking area of the shopping center." We find this proof legally insufficient to establish constructive notice.

"'Constructive notice' can be established through proof that [a] dangerous or defective condition existed for such a time that in the exercise of reasonable care, the owner should have become aware of the condition." *Elkins v. Hawkins Co.*, No. E2004-02184-COA-R3-CV, 2005 WL 1183150, at *4 (Tenn. Ct. App. May 19, 2005) (*no perm. app. filed*) (citing *Simmons v. Sears, Roebuck & Co.*, 713 S.W.2d 640, 641 (Tenn. 1986)). While the Plaintiffs proffered photograph might establish that the speed bump was in a defective condition, it provides insufficient proof to establish that Defendants Owen and Hold-Thyssen knew or should have known of such a defect prior to Mr. Thompson's fall. This Court recently addressed a similar circumstance in *Hampton v. Wal-Mart Stores, Inc.*, No. E2004-00401-COA-R3-CV, 2004 WL 2492283 (Tenn. Ct. App. Nov. 5, 2004) (*no perm. app. filed*). In *Hampton*, the plaintiff sued the defendant, Wal-Mart Stores, Inc., after slipping and falling over a broken bottle of baby food while shopping in a Wal-Mart store. *Id.* at *1. At trial, the trial court granted a motion for directed verdict for Wal-Mart after concluding that the plaintiff failed to present adequate proof showing that Wal-Mart created or had notice of the alleged dangerous condition. *Id.* On appeal, this Court affirmed the trial court, and held as follows:

> Ms. Hampton presented no direct proof that Wal-Mart had actual notice of the dangerous condition alleged and does not contend otherwise. We are compelled to

the conclusion that she also failed to present circumstantial evidence which would allow a jury to decide if the substance which allegedly caused Ms. Hampton to fall had been on the floor "for such length of time that [Wal-Mart] knew, or in the exercise of ordinary care should have known of its existence."

In support of her argument that the trial court erred in granting the motion for directed verdict, Ms. Hampton first references her testimony at trial that, immediately after she fell, she observed the approach of a man with a mop . . . .

This testimony is certainly not sufficient to establish that the baby food on the floor had been there so long that Wal-Mart knew, or should have known, of its existence prior to the time of Ms. Hampton's fall. A jury could not determine from this testimony whether the employee with the mop was aware of the spilled food prior to Ms. Hampton's fall or whether he only learned of its existence after Ms. Hampton fell. Any conclusion a jury might reach based upon this evidence would necessarily be based on "speculation, guesswork and conjecture."

In further support of her argument that the trial court erred in its grant of a directed verdict, Ms. Hampton references her additional testimony regarding the appearance of the spilled baby food at the time of her fall. Apparently the testimony to which Ms. Hampton refers in this regard was as follows:

> [Q.] And once you were up did you ever figure out what you slipped on?
> [A.] Yeah, it was baby food. It looked like apple sauce, ground up apple sauce. It was in the floor and it had spattered all the way across the aisle and had skimmed over. It was dry on top and the thicker parts were still wet on the bottom.

Ms. Hampton's apparent contention is that this testimony that the baby food "had skimmed over" constitutes circumstantial evidence from which the jury could reasonably infer that the baby food had been on the floor long enough for Wal-Mart to have constructive notice of its existence prior to her fall. Again, it is our determination that a jury considering this evidence could do no more than guess, conjecture or speculate as to its import with respect to the question of the extent of time the baby food had been on the floor. Ms. Hampton presented no evidence regarding how long it would have taken the baby food to assume a "skimmed over" appearance and under cross examination Ms. Hampton admitted that she herself does not know how long it takes baby food to skim over.

Id. at *2-3.

Like the plaintiff's testimony concerning the condition of the baby food in *Hampton*, the picture presented by the Plaintiffs showing the condition of the speed bump at the time of Mr. Thompson's fall constitutes insufficient circumstantial evidence from which a jury could reasonably infer that Defendants Owen and Hold-Thyssen had constructive notice of the alleged defective state of the speed bump prior to Mr. Thompson's fall. While juries may properly draw inferences from the evidence before them, whether direct or circumstantial, an inference can be drawn only from the facts and evidence and cannot be based on surmise, speculation, conjecture or guess. *Benton v. Snyder*, 825 S.W.2d 409, 414-15 (Tenn. 1992) (quoting 32 C.J.S. *Evidence* § 1044 (1942)). The Plaintiffs have set forth no evidence showing what kind of force it would have taken for the speed bump to become "dislodged and broken" or what time period it would take for the speed bump to move. Furthermore, the Plaintiffs' own expert witness, Henry Bledsoe, testified in his deposition as follows:

> Q. You have said that you believe that a portion of the speed bump had become dislodged or broken off?
> A. Yes.
> Q. You don't know when that occurred?
> A. No.
> Q. It could have occurred a month before Mr. Thompson fell or it could have occurred while he was in there eating that night?
> A. Possibly.

In light of the above facts, we find that a jury could not reasonably infer from looking at the Plaintiffs' proffered picture that the speed bump had been in a defective condition long enough for Defendants Owen and Hold-Thyssen to have had constructive notice of it before Mr. Thompson's fall. Rather, as in *Hampton*, we find "that a jury considering this evidence could do no more than guess, conjecture or speculate as to its import with respect to the question of the extent of time the [speed bump had been dislodged and broken]." *Hampton*, 2004 WL 2492283 at *3. We therefore affirm the trial court's grant of summary judgment in regard to the Plaintiffs claim that Defendants Owen and Hold-Thyssen were negligent in failing to correct the alleged defective condition of the speed bump.[5]

We next address the Plaintiffs' second argument in which they allege that disputed issues of material fact exist from which a jury could find that Defendants Owen and Hold-Thyssen were negligent for failing to keep the parking area adequately lit, and that this constituted the proximate cause of Mr. Thompson's fall. As previously noted, business owners "are required to exercise ordinary care with regard to social guests and business invitees on the premises." *Barron*, 2006 WL 16310 at *3. Such a duty of ordinary care on the part of business owners

[5]Of course, this holding does not prevent the Plaintiffs from arguing that insufficient lighting proximately caused Mr. Thompson to trip and fall over the speed bump. Rather, in light of our ruling, the Plaintiffs are only precluded from arguing that Defendants Owen and Hold-Thyssen were negligent in failing to remedy the speed bump's alleged defective or broken condition.

includes the provision of adequate lighting. *See Heggs v. Wilson Inn Nashville-Elm Hill, Inc., No.* M2003-00919-COA-R3-CV, 2005 WL 2051287, at *6 (Tenn. Ct. App. Aug. 15, 2005) (*no perm. app. filed*); *Threet v. Opryland, USA, Inc.*, No. 01A01-9805-CV-00255, 1999 WL 820815, at *3-4 (Tenn. Ct. App. July 14, 1999); *see also* C.J.S. *Negligence* § 580 (2005) (citations omitted) (stating that "[w]here the owner of property has undertaken to light an area of his or her property he or she is required to exercise reasonable care to provide adequate lighting.").

In opposition to Defendants Owen and Hold-Thyssen's motion for summary judgment, the Plaintiffs presented the deposition testimony of Dr. Robert Fox, a lighting expert, who testified that the lighting in the parking area where Mr. Thompson fell was inadequate. Specifically, Dr. Fox testified as follows:

> Question: "What is your opinion as to whether those lights are adequate enough to illuminate the pavement area once you leave the step-- of Ruby Tuesday's?"
>
> Answer: "The lights are designed to illuminate the sidewalk and they don't extend out into the parking lot area."
>
> Question: "Did you verify that with instruments that are appropriate to determine that light?"
>
> Answer: "Yes."

In response, Defendants Owen and Hold-Thyssen asserted 1) that the property in question had been regularly inspected, 2) that Defendant Hold-Thyssen had contracted to have several burned-out parking lot lights replaced, and such work was performed a few days before Mr. Thompson's fall, and 3) that Defendants Owen and Hold-Thyssen had no notice that the parking lot lighting was insufficient because, prior to Mr. Thompson's fall, neither Defendant Owen or Defendant Hold-Thyssen had received any complaints concerning the sufficiency of lighting in the area.

Based upon the foregoing facts, we find that a jury could potentially find that Defendants Owen and Hold-Thyssen were negligent in failing to maintain proper lighting in the parking lot and that this was a proximate cause of Mr. Thompson's fall. In his deposition, Mr. Thompson stated that he tripped over the speed bump because there was insufficient light for him to see it. Mr. Thompson's claim was subsequently corroborated in the deposition of Dr. Fox, who claimed that the lighting was insufficient to illuminate the parking lot area where Mr. Thompson fell. Although Defendants Owen and Hold-Thyssen claim that they had no notice that the lighting in the parking area was insufficient, the undisputed facts, viewed in light most favorable to the Plaintiffs, appear to show that the Defendants created and maintained the allegedly insufficient lighting scheme. As previously noted by this Court, "[i]f the proof shows that the defendant created the hazardous condition, the notice requirement will not be triggered, since a defendant need not be otherwise notified of what he has done." *Longmire, et ux, v. Kroger Co.*, 134

S.W.3d 186, 189 (Tenn. Ct. App. 2003) (citing *Stringer v. Cooper*, 486 S.W.2d 751 (Tenn. Ct. App. 1972)). Further, the undisputed fact that Defendants Owen and Hold-Thyssen may have regularly inspected the premises and replaced the bulbs in the existing lighting fixtures does not establish that such lighting fixtures provided adequate lighting for the parking area in dispute. Rather, this is an issue of material fact that a jury should decide. As a result, we reverse the trial court's grant of summary judgment on this issue.

Conclusion

Based upon the foregoing, we hereby affirm the trial court's grant of summary judgment in favor of Defendant Ruby Tuesday, Inc., in its entirety, and in favor of Defendants Owen and Hold-Thyssen in relation to the Plaintiffs' negligence claim arising from the alleged defective condition of the speed bump. However, we reverse the trial court's grant of summary judgment in favor of Defendants Owen and Hold-Thyssen in relation the Plaintiffs' claim that the alleged defective state of the lighting caused Mr. Thompson to trip over the speed bump. This case is hereby remanded for further proceedings consistent with this opinion. Costs of this appeal are awarded against Defendants Owen and Hold-Thyssen, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE